TIM HART
v.
BUREAU OF LAND MANAGEMENT

TIM HART AND DARWIN HILLBERRY
v.
BUREAU OF LAND MANAGEMENT

IBLA 98-17, 2000-133 Decided April 9, 2001

Appeals from decisions of Administrative Law Judge Harvey C. Sweitzer denying applications under the Equal Access to Justice Act for award of attorney fees and expenses. WY-01-96-01, WY-01-97-01, and WY-01-97-02 (Buffalo Creek Grazing Allotment).

Affirmed.

1. Attorney Fees: Equal Access to Justice Act: Prevailing Party--Equal Access to Justice Act: Generally

   In order to qualify for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994), an applicant must be a prevailing party in an adversary adjudication. Where an issue in a hearing on a grazing permit is remanded to BLM by an Administrative Law Judge for clarification but the decision of BLM has been substantially affirmed, the applicant is not a prevailing party.

2. Attorney Fees: Equal Access to Justice Act: Prevailing Party--Equal Access to Justice Act: Generally

   A party need not obtain a final decision on the merits to be considered a prevailing party for the purpose of determining the merits of awarding attorney fees if the party received some of the benefits sought when bringing the appeal and there is a clear causal connection between the appeal and the beneficial outcome attained. Where evidence and testimony indicate that the benefits obtained by the applicant were the product of negotiation and not induced by the filing of the appeal, there no causal connection demonstrated and prevailing party status has not been shown.

APPEARANCES: Karen Budd-Falen, Esq., and Richard Walden, Esq., Cheyenne, Wyoming, for appellants Tim Hart and Darwin Hillberry; and Jennifer E. Rigg, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Tim Hart and Darwin Hillberry have appealed from decisions by Administrative Law Judge Harvey C. Sweitzer denying applications for attorney fees and expenses, pursuant to the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504 (1994), and Departmental regulations at 43 C.F.R. Part 4, Subpart F. Hart appeals the August 21, 1997, denial of relief sought based on a February 24, 1997, decision to remand the matter in WY-01-96-1 (Buffalo Creek Grazing Allotment) to the Bureau of Land Management (BLM). Both Hart and Hillberry appeal the December 7, 1999, denial of relief sought based on a September 21, 1998, settlement in the matters of WY-01-97-1 and WY-01-97-2 (Buffalo Creek Grazing Allotment).

Hillberry is the president of Hillberry Cattle Company, owner of the base property in the Buffalo Creek Allotment (BCA), No. 00529. The BCA is located within the Grass Creek Resource Area, District, BLM. The base property also supports the Coal Mine and Prospect Commons Allotments. Hart has leased the base property, attendant water rights, and the BCA from Hillberry since 1986.

The BCA, encompassing approximately 15,538 acres of land, is comprised of 56 percent BLM lands, 27 percent private lands, and 16 percent State lands (leased by Hart). The BLM lands are divided into four pastures, the 15 Mile Pasture, the Center Pasture, the Rim Pasture, and the Highway Pasture. A separately fenced pasture, the Homestead Pasture, contains the private lands. The allotment management agreement and permit, beginning in 1986, provided for 1,404 animal unit months (AUMs) for cattle and 48 AUMs for sheep. 1/

In 1990, Hart proposed to BLM that the four BLM pastures and the Homestead Pasture become part of a five pasture deferred grazing rotation system. Under this strategy, each of the pastures would be entirely rested from grazing during June in alternating years. In response, BLM undertook a study in 1992 to determine allotment utilization. In 1993, BLM determined that the stocking rate for the BCA should be reduced. After discussing with Hart several proposed allotment management plans (AMPs), BLM issued a proposed decision on March 13, 1996. Hart protested and a final decision was issued on April 12, 1996. Hart appealed the final decision pursuant to 43 C.F.R. § 4160.4, which appeal to the Hearings Division was docketed as WY-01-96-01. Hillberry was granted permission to intervene. A motion for stay of BLM's decision filed by Hill was granted by this Board on July 11, 1996.

1/ An AUM is the amount of forage necessary for the sustenance of one animal or its equivalent for a period of 1 month. 43 C.F.R. § 4100.0-5.

In October 1996, a hearing was held before Judge Sweitzer and post-hearing briefs were submitted. On February 24, 1997, Judge Sweitzer remanded the matter to BLM to clarify an ambiguity regarding implementation of the rotation plan. A motion to reconsider filed by BLM was denied on March 29, 1997.

After remand, BLM issued a decision on April 9, 1997. Hart and Hillberry appealed, and their appeals were docketed by the Hearings Division as WY-01-97-01 (Hart v. BLM) and WY-01-97-02 (Hillberry v. BLM). A hearing was scheduled by Judge Sweitzer for late September, but on September 21, 1998, BLM and appellants agreed to the Buffalo Creek Allotment Settlement Agreement Conceptual Allotment Management Plan, thereby rendering the appeals moot.

At issue here are two applications for award of fees and expenses under EAJA based on Judge Sweitzer's two decisions outlined above. The first application, for $64,726.99, was filed by Hart after Judge Sweitzer denied BLM's motion to reconsider his decision to remand the matter in WY-01-96-01 to BLM. On August 21, 1997, Judge Sweitzer rejected the application, concluding that his remand to BLM was "not a decision on the merits of [the] appeal" and therefore Hart was not a "prevailing party." (August 21, 1997, Decision at 2-3.) He further opined that, with respect to Hart's request for fees incurred pursuing the stay motion and fees incurred opposing BLM's motion for reconsideration, there was no evidence the stay decision was based upon the merits or that Hart's effort in opposing reconsideration was more than de minimis or technical in nature, as no decision on the merits had been rendered.

The second application, for $110,688.55, was filed by Hart and Hillberry following settlement of the appeals in WY-01-97-1 and WY-01-97-02. In a decision dated December 7, 1999, Judge Sweitzer denied the request. He held that the appellants were not prevailing parties within the meaning of EAJA because the appeals were not a substantial or necessary factor in achieving the relief obtained. He further concluded that BLM was substantially justified in its position.

Appellants have timely appealed both decisions to deny their applications under EAJA for fees and expenses, arguing that Judge Sweitzer's determinations are in error. While these two appeals before the Board are based on separate decisions, we consolidate them for consideration because they derive from the same factual background. We, however, will address them individually as to their merits.

We start our review here by observing that Departmental regulation 43 C.F.R. § 4.601 provides in pertinent part:

> Under [EAJA] an eligible party may receive an award for attorney fees and other expenses when it prevails over the Department in an adversary adjudication under 5 U.S.C. 554 before the Office of Hearings and Appeals unless the Department's position as a party to the proceeding was substantially justified or special circumstances make an award unjust.

The regulation is promulgated to implement the statutory provision that

> [a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1) (1994) (emphasis added). Accordingly, we must assess whether the specified determinants -- adversary adjudication, prevailing party, substantially justified, and special circumstances -- are evident in these cases. 2/

The term "adversary adjudication" is defined by EAJA as "an adjudication under section 554 of [Title 5] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license." 5 U.S.C. § 504(b)(1)(C)(i) (1994); see also 43 C.F.R. § 4.602(b). By its terms, 5 U.S.C. § 554 (1994) applies "in every case of adjudication required by statute to be determined on the record after the opportunity for an agency hearing," subject to certain exceptions not relevant here. In Collord v. U.S. Department of the Interior, 154 F.3d 933 (9th Cir. 1998), the court held that 5 U.S.C. § 554 (1994) applies where a hearing is required by due process, even though it may not be required by statute. Thus, those grazing rights which were to be the subject of hearings to be conducted by an administrative law judge are rights whose adjudication could form the basis for attorney's fees. See, e.g., BLM v. David and Bonnie Ericsson, 98 IBLA 258, 261-263 (1987).

To be considered a "prevailing party," "[a] party need not obtain a final judgment on the merits." J. Claude Frei and Sons v. BLM, 145 IBLA 390, 394 (1998). A party qualifies as a prevailing party if the action was a "causal, necessary, or substantial factor in obtaining the result" the party sought. Id. The party seeking fees has the burden of demonstrating a sufficient causal relationship between the action and the ultimate relief obtained. Id.

2/ We note that the statute, 5 U.S.C. § 504(b)(1)(B) (1994), and the regulations, 43 C.F.R. § 4.605, also apply a financial requirement under which the applicant may not have a net worth of not more than $2 million, or a corporation of not more than $7 million. BLM has questioned the qualifications of Hillberry, d/b/a Hillberry Cattle Company, speculating on the accuracies of the financial statements submitted. Judge Sweitzer did not rule on this question, but, briefly discussing the issue, impliedly accepted the accuracy of the documents submitted. (Dec. 7, 1999, Decision at 8-9.)

Whether an agency was "substantially justified" in its position is not necessarily based on the adjudicator's disposition of the matter, as Congress has stated as follows: "The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." H.R. Rep. No. 96-1418, 96th Cong. 2d Sess. 11, reprinted in 1980 U.S.C.C.A.N. 4984, 4990. As the Board has held: "Even if the Government loses * * * one cannot conclude its position was not substantially justified. Otherwise, the EAJA would be no different from an automatic fee-shifting statute, which Congress clearly did not intend it to be." Kaycee Bentonite Corp., 79 IBLA 182, 196, 91 I.D. 138, 146 (1984) (citations omitted).

An agency should not be held liable

> where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

H.R. Rep. No. 96-1418, 96th Cong. 2d Sess. 11, reprinted in 1980 U.S.C.C.A.N. 4984, 4990.

We must also bear in mind that the Supreme Court has cautioned: "The EAJA renders the United States liable for attorney's fees for which it otherwise would not be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States." Ardestani v. I.N.S., 502 U.S. 129, 137 (1991). We therefore proceed to apply these principles to the circumstances and issues before us in these appeals.

In the Matter of WY-01-96-01

In his decision denying an award in WY-01-96-01, Judge Sweitzer concluded as follows:

> Citing Rife Oil Properties, Inc., 116 IBLA 18 (1990) and Ann Marie Savers, 115 IBLA 40 (1990), BLM contends that dismissal of Mr. Hart's application for attorney's fees and costs is appropriate because there has not yet been a ruling on the merits of the underlying controversy. When there has not been a ruling on the merits of an appeal, an appellant does not satisfy the EAJA requirement of being a "prevailing party" under 5 U.S.C. § 504(a)(1) and therefore does not qualify for an EAJA award. See Rife Oil Properties, Inc., 116 IBLA at 21.

* * * * * * *

> Admittedly, the cases cited by BLM are distinguishable in that the Office of Hearings and Appeals (OHA), U.S. Department of the Interior, did not grant in either case the relief requested by the EAJA applicant in the underlying dispute. * * * Unlike the EAJA applicants in these two cases, Mr. Hart did obtain from OHA (the Hearings Division) the relief which he requested, namely, vacation of BLM's April 12, 1996, Final Decision and remand of the matter to BLM for further consideration.
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> However, the Supreme Court has held that to qualify as a prevailing party, a party must obtain at least some relief on the merits of his claim. Farrar v. Hobby, 506 U.S. 103, 111 (1992). Where, as here, a party succeeds in obtaining part or all of the relief which he sought, but that relief does not result from a determination on the merits, the party does not prevail. See La Rouche v. Kezer, 20 F.3d 68, 72 (2nd Cir. 1994).

(August 21, 1997, Decision at 1-2.) As noted, he was also denied an award for costs incurred in the stay motion and reply to petition for reconsideration based on the fact that there was no determination on the merits.

In his statement of reasons, Hart argues that, in order to qualify as a prevailing party, he needed to "merely show that he succeeded on a significant issue, obtained relief and that the lawsuit was necessary to achieve that result." Citing Texas Teachers Ass'n v. Garland School District, 489 U.S. 782, 792 (1989), he asserts that the measure for determining whether a party has succeeded on any significant issue is whether the party "can point to a resolution of the dispute which changes the legal relationship between itself and the defendant." He then contends that "[b]y vacating the BLM Decision, the ALJ eliminated the arbitrary and capricious grazing rotation plan that [he] had complained of." Hart further asserts that he was not required to succeed on all his claims inasmuch as he obtained the full relief he had requested, and BLM's decision was vacated as a result of his prevailing on a single, significant issue. He contends the determination that vacating the decision was not a decision on the merits is in error.

In its reply, BLM refutes Hart's arguments, claiming that "he has obtained absolutely no relief on the merits of his claim, nor has he succeeded on any significant issue in the case." BLM argues that when Judge Sweitzer sought clarification regarding one discrete point concerning the rotation plan, his action was not a ruling on the merits and it did not benefit Hart because Judge Sweitzer did not direct BLM to grant the relief sought. Judge Sweitzer's remand, BLM asserts, simply left the parties in the same position that they occupied when BLM issued its initial determination. As for its significance, BLM argues that the issue upon which remand was grounded was not among those raised by Hart in challenging BLM's determination. The issue, BLM explains, was one that was not realized by

Hart until the hearing and did not require "attorney time." Moreover, BLM contends, the remand did not establish that BLM's decision "was arbitrary, capricious, or otherwise contrary to law," and therefore the success achieved by Hart does not justify the award sought.

We find from the arguments presented that, to determine whether Hart was a prevailing party, we must compare in detail BLM's decision and Judge Sweitzer's disposition of the matter.

A management framework plan (MFP) for the Grass Creek Resource Area, based on an environmental impact statement conducted for grazing activities, was issued in 1983 and outlined several land use planning concerns which apply to BCA. The area to become the BCA was categorized as "improve" or "I-category" grazing lands. "I-category" allotments are generally in fair to poor range condition with a static or downward trend, with the recognition that significant decreases in authorized grazing may be necessary to improve range conditions. (MFP, Exhibit (Ex.) A-7 (WY-01-96-01) at 144-146.) Development of an AMP for BCA was scheduled by BLM to be undertaken in 1995, but plan formulation was expedited due to Hart's requests for usage increase and BLM's observation of utilization levels. (March 8, 1996, Proposed Decision at 2.) After numerous meetings with Hart and detailed input from him, several draft AMPs were developed from 1993 through 1996.

In its final proposed decision issued March 8, 1996, BLM observed: "The productivity and cover of perennial bush grasses can be substantially improved[;] [e]xtensive acreages of heavy (60 - 80 percent) and severe (80 percent) utilization levels have been documented throughout the allotment[;] [t]hese issues indicate grazing management practices are in conflict with the land use planning decisions * * *." Id. at 2. BLM proposed modifying utilization by 30 percent, to 984 AUMs for cattle on public lands. 3/ A 4-year grazing schedule rotating among the four public pastures in BCA was also proposed so as to distribute grazing during the May 15 to July 1 period. In his protest, Hart asked that BLM withdraw the proposal in order to allow additional time to develop a coordinated resource management plan and he also argued, inter alia, that the proposal ignored private and state resources and that the utilization data relied upon by BLM was in error. After an extensive response to the protest, BLM concluded in the April 12, 1996, decision that there was "no factual data to support why the Proposed Decision should not be upheld" and adopted the utilization plan outlined in the proposal.

Was this matter then, when appealed to the Hearings Division, resolved in Hart's favor by Judge Sweitzer's remand? In his decision, Judge Sweitzer focused on one issue as follows:

3/ Appellants sought, but did not obtain, conversion of the 48 sheep AUMs to cattle AUMs.

This scenario is based upon the assumption that once Mr. Hart removes his cattle from a pasture, he may not return his cattle to that pasture during the same grazing season (Tr. 440). Thus, he assumes that when he removes his cattle from the Center Pasture on June 20 to comply with the June 21 to June 30 prohibition against grazing the allotment, he cannot return to that allotment in 1998 to make full use of the available AUMs in that pasture, and 448 of the 1640 AUMs allotted to Mr. Hart under the decision cannot be used (Ex. A-14).

When BLM's range management specialist for the allotment, James Wolf, was questioned regarding the rotational grazing plan, he confirmed that the decision dictates that once Mr. Hart removes his cattle from a pasture, he may not return his cattle to that pasture during the same grazing season (Tr. 220-223). That is supported by the fact that a specific schedule is established in the decision by which Mr. Hart may graze each pasture only once each year and only one pasture may be grazed at a time (Ex. A-4).

However, Mr. Wolf also pointed out that the decision does not dictate the dates upon which Mr. Hart must transfer cattle from one pasture to another nor the number of AUMs to be used in each pasture (Tr. 220-223; Ex. A-4). Rather, the decision gives Mr. Hart the responsibility and discretion to determine the duration and extent of pasture usage within the decisional framework of using the pastures in a certain order (Tr. 220-223; Ex. A-4) * * *.

What is not clear from an examination of the decision and Mr. Wolf's testimony, is whether Mr. Hart is correct in his assumption that he may not return his cattle to the Center Pasture in 1998 after mandatory removal of the cattle on June 20. * * * [T]he decision may be reasonably interpreted as imposing a hiatus (from June 21 to June 30) on Mr. Hart's use of the Center Pasture, after which he may immediately return to the pasture to complete usage of the pasture "as he sees fit." However, it may also be reasonably interpreted as precluding return to the pasture after the mandatory June removal. Therefore, the decision is ambiguous on this point.

* * * * * * *

Appellants contend that the decision must be set aside for several reasons, including the alleged fact that the rotational grazing plan is unworkable in that Mr. Hart cannot use 448 of the 1640 AUMs allotted in 1998. BLM counters that Mr. Hart admittedly did not raise this contention in his statement of reasons for appeal and thus waived this ground of error under 43 CFR 4.470(a) and 43 CFR 4.474(a).

> However, such a waived ground of error may be addressed if permitted by the administrative law judge, see 43 CFR 4.470(a), 4.474(a), and the circumstances dictate that it should be addressed * * *.

(February 24, 1997, Decision at 2-4.) Focusing on that single issue, Judge Sweitzer remanded the matter as follows:

> The key point, however, is that the decision is ambiguous: it can be reasonably interpreted as * * * precluding [Hart] from returning his cattle to the Center Pasture after removal on June 20, but it can also be reasonably interpreted as permitting full use of the 1640 AUMs by permitting further grazing on the Center Pasture after the 10-day grazing hiatus. * * * Because the decision at issue is ambiguous, it must be set aside and the matter remanded to BLM * * *.
>
> In so holding, it is worth noting that the record, as it now stands, evidences the need for a reduction in the authorized use of 2340 AUMs and the installation of range improvements. It appears that the interests of all parties would be best served by reaching an agreement providing for both an authorized use reduction and range improvement installations.

(February 24, 1997, Decision at 4.)

Hart grounds his application for award under EAJA on his contention that "[b]y vacating the BLM Decision, the ALJ eliminated the arbitrary and capricious grazing rotation plan that [he] had complained of." Based on our reading of Judge Sweitzer's decision, as set forth above, appellant's argument appears specious. The rotational plan was not eliminated as argued by appellant but set aside in order that an imperfection in the presentation of the plan could be addressed. Judge Sweitzer was very specific that neither interpretation of the rotational plan was in error, thus allowing either position to be adopted on further review. However, it is certainly clear that he found no fault in BLM's position that a reduction in the authorized use was necessary. From appellant's standpoint, his "success" in the remand was that, due to a stay having been granted, BLM's decision only became further delayed in implementation pending resolution of the identified ambiguity. The legal relationship between the parties essentially was not altered by Judge Sweitzer's action, only the timing of implementation.

[1] The instant situation is one where further clarification from BLM was sought without rendering conclusive judgment on the merits of the proceedings. In reviewing similar circumstances, the Supreme Court has opined:

> [W]here a court's remand to the agency for further administrative proceedings does not necessarily dictate the receipt

> of benefits, the claimant will not normally attain "prevailing party" status * * * until after the result of the administrative proceeding is known. The situation is for all intents and purposes identical to that we addressed in Hanrahan v. Hampton, 446 U.S. 754 (1980). * * * We found that such "procedural or evidentiary rulings" were not themselves "matters on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party * * *." Id. at 759. More recently in Texas State Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782 (1989), we indicated that in order to be considered a prevailing party, a plaintiff must achieve some of the benefit sought in bringing the action. Id., at 791-793. We think it clear that under these principles a [claimant] would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings.

Sullivan v. Hudson, 490 U.S. 877, 886-887 (1989) (remand for agency proceedings where EAJA is not applicable). Thus, appellant here is not a "prevailing party" in the matter of WY-01-96-01 as he obtained absolutely no relief on the merits of his appeal. Therefore, Judge Sweitzer properly denied his EAJA application in this case.

We note that, had Hart not failed to satisfy the prevailing party standard, we still would be unable to affirm that he is entitled to an award under EAJA inasmuch as the record manifests that BLM was "substantially justified" in its position. Judge Sweitzer explicitly confirmed that BLM's plan for reduction was warranted and that his remand was for clarification of a segment of the rotational plan which, he concluded, could be interpreted in either fashion. According to Judge Sweitzer's evaluation, resolution of the ambiguity should neither invalidate nor seriously modify BLM's plan. Hence, BLM was justified in its actions.

As for Hart's observations noting his successes in his petition for stay and motion for reconsideration, we cannot grant relief on the basis of these actions. As the underlying action upon which these motions were pursued did not produce success for Hart, there is no connection between the relief sought and the relief obtained. The record reflects that these actions merely postponed the implementation of BLM's determination; they did not obtain the relief for which Hart had filed the appeal. Accordingly, there is no justification for granting any award of fees or costs based on Hart's "success" in pursuing these motions.

In the Matter of WY-01-97-01 and WY-01-97-02

Upon remand from Judge Sweitzer of its grazing allotment determination for BCA, BLM issued a proposed decision on April 9, 1997, reducing the BCA grazing allocation to 1,640 AUMs, implementing a grazing rotation plan, and establishing a monitoring plan. Noting that "[n]o new information or monitoring data * * * has surfaced that would cause [it] to reconsider the other substantive points of [the] decision of April 12, 1996,"

BLM reflected that "[t]his proposed decision is very similar to [the] final decision of April 12, 1996, with the following exceptions: (1) this decision clarifies the grazing rotation plan * * *; (2) this decision allows a three-year phase in of the reduction in total number of AUMs for cattle; and (3) this decision extends the evaluation period by one year." In the absence of a protest, the decision became final on April 24, 1997.

An appeal and petition for stay were filed by Hart on April 28, 1997, and an appeal and petition for stay were received from Hillberry on May 27, 1997. The petitions for stay were granted by this Board. In an order dated February 12, 1998, Judge Sweitzer, ruling on prehearings requests, consolidated the two appeals, denied appellants' motion for partial summary judgment, and granted BLM's motion to expedite. The matter was set for hearing on September 22, 1998.

On September 21, 1998, appellants and BLM entered into the "Buffalo Creek Allotment Settlement Agreement Conceptual Allotment Management Plan." Under this plan, the active preference for BCA would not be reduced, with grazing to be conducted under a four pasture deferred grazing plan. The grazing schedule "will be modeled after the plan the permittee submitted to BLM in 1993." (Agreement at 2.) The permittee was provided thereunder the flexibility "to move cattle between pastures without prior approval from the BLM based on the criteria for pasture moves." Id. at 4. However, there was to be no grazing from May 1 to June 15. As for range improvements, the permittee agreed to purchase materials and construct a 9-mile fence for the Center pasture, and BLM agreed to supply materials for a water tank and accessories. BLM also agreed to explore water development for the 15 Mile and Center pastures, while the permittee agreed to maintain BLM reservoirs as needed. The parties also agreed that utilization and trend data would be collected on key species in key areas, and such monitoring data would be reviewed annually to evaluate the effectiveness of the agreement.

Based on a joint motion to Judge Sweitzer, BLM's April 7, 1997, decision was vacated and the appeals thereof withdrawn by order dated September 23, 1998.

Hillberry and Hart filed a joint application for fees and expenses under EAJA on October 21, 1998. In a December 7, 1999, decision, Judge Sweitzer denied the application because Hart and Hillberry "failed to establish that there appeals were a catalytic, necessary, or substantial factor in achieving the settlement by which the reduction in permitted use was eliminated" and because BLM "established that its position in the underlying matter was substantially justified." (December 7, 1999, Decision at 16.) In light of his conclusions, Judge Sweitzer did not rule on whether Hillberry qualified as a "party" in the sense that he satisfied the financial restrictions. Id. at 8-9. In response to appellants' contention

that they prevailed on the issue of diminished AUMs, Judge Sweitzer took notice of the following:

> The Settlement Agreement represented a departure from Applicants' previous position not only with regard to the turnout date, but also with respect to Applicants' willingness to fund the construction of fencing as a range improvement. Until settlement, Applicants never deviated substantially from their initial position that there should be no reduction in permitted use, no change in the turnout date, and no funding on their part.

(December 7, 1999, Decision at 10.) He concluded that appellants' "change in position regarding the turnout date and funding of fencing, as opposed to [their appeals], were the catalyst for the settlement." Id. at 11. Hart and Hillberry appealed.

In their statement of reasons, appellants argue that they prevailed within the meaning of EAJA although they did not obtain a final judgment. Citing J. Claude Frei and Sons v. BLM, 145 IBLA 390, 394 (1998), they contend that the necessary elements are present: they succeeded on a significant issue and the action was a material factor in obtaining the desired result. Appellants argue that the only relief they sought which they did not obtain was the conversion of sheep AUMs to cattle AUMs. They stress that, as a result of the settlement agreement, BLM has expanded the grazing period to include January 1 through April 15, BLM did not reduce AUMs, and BLM will provide range improvements. Appellants strongly assert that, but for the filing of the appeals, BLM would not have changed its position on AUM reduction. In addition, appellants contend that BLM was not "substantially justified" in the position it took in the decisions issued regarding AUM reduction. They argue that the methods used by BLM to determine carrying capacity were flawed and incapable of rendering accurate information.

In rebuttal, BLM contends that its position was substantially justified, as outlined by Judge Sweitzer in his decision. BLM further argues that appellants took a litigious approach "from the beginning" which precipitated "stonewalling" on appellants' part and prevented resolution of the issues. Noting that appellants' counsel was hired nearly 1-½ years before the 1996 decision, BLM avers that appellants and counsel were unwilling to consider or propose alternative solutions. BLM argues that the settlement agreement was fashioned not as a result of the legal work done for the appeals but only after alternatives were considered outside of the hearings processes.

[2] It is apparent that both parties believe the settlement agreement was achieved because the other changed its position -- BLM, with respect to AUM reduction, and appellants, with respect to a later turnout date. As noted, the initial hurdle to recovery under EAJA is that the

appellant is a "prevailing party." In J. Claude Frei and Sons v. BLM (Frei), 145 IBLA at 394 (argued by appellants as justifying an award to them), the Board said:

> A party need not obtain a final judgment on the merits to be considered a prevailing party under the EAJA. The party qualifies as a prevailing party if the action was a "causal, necessary, or substantial factor in obtaining the result" the party sought. Public Citizen Health Research Group v. Young, 909 F.2d 546, 549 (D.C. Cir. 1990), quoting Commissioners Court of Medina County, Texas v. United States, 683 F.2d 435, 442 (D.C. Cir. 1982) (construing the "prevailing party" language in 28 U.S.C. § 2412(d)1)(A) (1994), a substantially identical statutory provision for award of attorney fees connected with court litigation). A party who succeeds on any significant issue in the litigation and achieves some of the benefits sought may be eligible to recover attorney fees. BLM v. Cosimati, 131 IBLA 390, 395 (1995); see Chapoose v. Hodel, 831 F.2d 931, 936 (10th Cir. 1987). The inquiry focuses on whether the action was a material factor or acted as a catalyst in bringing about the desired outcome. Wilderness Society v. Babbitt, 5 F.3d 383, 386 (9th Cir. 1993); Taylor Group Inc. v. Johnson, 915 F. Supp. 295, 297 (M.D. Ala. 1995). The party seeking fees has the burden of demonstrating a sufficient causal relationship between the action and the ultimate relief obtained. Chapoose v. Hodel, supra.

In determining that a causal connection existed, the Board observed: "Had the Permittees not appealed, the stay would not have been issued. Had the stay not been issued, there would have been no reconsultation. Had there been no reconsultation, spring grazing would not have been allowed or reinstated on eight of the grazing allotments." Frei, 145 IBLA at 395.

We find that the causal connection argued by appellants does not exist here. In his decision on this matter, Judge Sweitzer opined as follows:

> As to the question of whether the Applicants prevailed, there is no dispute that an Applicant for fees and costs who settles the underlying matter may be deemed the "prevailing party" if: (1) the Applicant received a significant part of the relief it sought; and (2) the lawsuit was a catalytic, necessary or substantial factor in obtaining that result. See Maduka v. Meissner, 114 F.3d 1240, 1241 (D.C. Cir. 1997). It is also undisputed that, where, as here, the underlying matter is resolved by settlement, it is the second factor that is most relevant.
>
> Applicants received at least part of the relief which they sought in that the settlement eliminated the reduction

in the grazing usage imposed by the 1997 Decision. Respondent [BLM] argues that Applicants' appeals of the 1997 Decision were not catalytic, necessary, or substantial factor in obtaining that result because it was available to Applicants as far back as 1994 if Mr. Hart had been willing to accept a change in the turnout date at that time.

The facts, as established by the hearing record or exhibits submitted along with the briefs regarding the Application, show that BLM was concerned with "managing critical growing season use by rotating and decreasing the number of AUMs." (Ex. 33 to Applicants's Reply to Respondent's Answer to Applicants' EAJA Application.) In November 1994, early in the negotiation process, the "stumbling blocks" were acknowledged to be "the early turnout date and the amount of the cut [in AUMs]." (Id.) The implementation and funding of range improvements were also crucial concerns.

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Based upon Mr. Hart's insistence that he could not accept a turnout date on the Allotment later than April 15, all draft AMPs and subsequent decisions evaluated the stocking levels in terms of an allotment that would be grazed during the entire growing season. Applicants did not indicate a willingness to consider an alternative turnout date until September 1998, when Mr. Phillippi contacted Mr. Wolf to initiate settlement negotiations between BLM and Applicants' range management consultants for the first time.

The Settlement Agreement represented a departure from Applicants' previous position not only with regard to the turnout date, but also with respect to Applicants' willingness to fund the construction of fencing as a range improvement. Until settlement, Applicants never deviated substantially from their initial position that there should be no reduction in permitted use, no change in the turnout date, and no funding of fencing on their part.

Mr. Hillberry first commissioned Mr. Phillippi in October 1995 to conduct a range analysis of the Allotment. By the end of November 1995, he had prepared a written assessment of the Allotment. Prior to the October 1996 hearing, no BLM personnel had met Mr. Phillippi. Except during the hearing, Applicants range management consultants did not disclose their data and conclusions nor otherwise speak to BLM personnel until September 1998.

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Based upon the foregoing evidence, I must find that Applicants did not meet their burden of showing that their

> appeals were catalytic, necessary, or substantial factor in achieving the result of no reduction in their permitted use. Their previous appeals of the April 12, 1996, Decision did not accomplish that result and it appears that their change in position regarding the turnout date and funding of fencing, as opposed to the appeals of the April 9, 1997, Decision, were the catalyst for the settlement with no reduction in permitted use.

(December 7, 1999, Decision at 9-11.)

The simple question in this matter is: "Did the action of appealing the 1997 decision result in the relief obtained?" As we noted in Frei, "the party seeking fees has the burden of demonstrating a sufficient causal relationship between the action and the ultimate relief obtained." 145 IBLA at 345. Judge Sweitzer concluded that appellants were unsuccessful in showing such a relationship. His determination was based upon the following factors: Appellants were rigid in their attitude on changes to the "turnout date" and funding of the fencing endeavor, BLM was not motivated to modify its position because of the appeals filed as evidenced by its willingness and intent to proceed with the hearing process, and settlement was achieved only after appellants' range specialist pursued a dialogue with BLM immediately prior to the established hearing date. His conclusion comports with the evidence before us -- the settlement agreement was a product of convenience for both parties, not a result of capitulation by BLM. There is nothing to suggest that appellants' appeals were the catalyst for the settlement agreement, and appellants' arguments on appeal do not evince otherwise. Accordingly, we affirm Judge Sweitzer's decision that appellants did not prevail on the basis of their adjudicative action.

As with the matter in WY-01-98-01, had appellants not failed to satisfy the prevailing party standard, they still would not be entitled to an award under EAJA inasmuch as the record manifests that BLM was "substantially justified" in its position. Appellants make sophisticated arguments regarding data employed by BLM to determine carrying rates. We find the evidence and testimony provided compelling enough to warrant review of the matter but not sufficient to conclude that BLM was not "substantially justified" in light of the expert testimony found in the record.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed.

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James P. Terry
Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge